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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

GARY PRINSKI,
Petitioner,

v.

TERMAR NAVIGATION CO., INC. and
VAN OMMERER SHIPPING B.V.,
Respondents.

Petiton for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

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Respondents, in their Brief in Opposition, concede -- as they must -- the ongoing conflict in circuits arising from the Third Circuit's decision in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. (1987), *cert. denied*, 496 U.S.1007 (1988), and the decisions from the Fifth and Ninth Circuits.[1] Their arguments that the instant case is not an appropriate case in which to resolve that conflict are wrong, both factually and legally.

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1. See *Woods v. Sammisa Co., Ltd., et al.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990), *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), and *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982).

1. Respondents' assertion, at page 3 of the Brief in Opposition, that the issue of "whether the cargo was work space" was not addressed by either the District Court or the Third Circuit in this case is a patent misstatement. The issue clearly was raised in the District Court, considered in the District Court's decision, and resolved against Petitioner by the District Court's citing of the Third Circuit's decision in *Derr*. Thus, the following excerpt from the District Court opinion:

> Plaintiff argues that the ice on the black steel piping in the #2 hold of the M/V Serafin Topic was a dangerous condition in the ship's **work space**, of which the defendants should have known and for which they may be held liable. However, the Third Circuit in Derr held that the Supreme Court's reference to "**work space**" was not intended to include stowed cargo. See Derr, 835 F.2d at 495. (5a) (Emphasis in bold supplied)

Quite clearly, the issue of whether stowed cargo is part of the "work space" of a vessel goes to the very heart of the instant case. That it was not a stipulated fact in the District Court, see Brief in Opposition at page 3, hardly can be considered surprising for it was the very issue that was presented to the court for resolution. As set forth in the excerpt quoted above, it is an issue that was addressed by the District Court. Furthermore, it is an issue that necessarily was considered by the Third Circuit in affirming the District Court's decision, and, in any event, it most assuredly is an issue that was addressed by the Third Circuit in the *Derr* decision itself, see 855 F.2d at 495-6. It thus is an issue clearly raised in the case, amply supported by the record and urgently in need of review by this Court.

2. At page 6 of the Brief in Opposition, Respondents erroneously assert that the parties "agree" that Respondents had no "constructive" knowledge of the ice. This is not correct and is a gross misstatement of Petitioner's position in this case.

It always has been Petitioner's position, from the inception of the case, that the presence of the ice was a condition which was capable of being discovered by reasonable inspection, and, therefore, was a condition of which Respondents should be deemed to have "constructive" knowledge. The District Court recognized this when it stated Petitioner's position as follows:

> The plaintiff argues that the defendants are liable for his injuries because they failed to inspect the cargo hold before Holt began offloading the cargo in Camden. **Plaintiff contends that had defendants properly inspected the cargo, they would have discovered the ice and the danger it presented, and they would have been required to remedy or warn about the condition.** Defendants counter they had no duty to inspect. (2a) (Emphasis in bold supplied)
>
> . . . .
>
> Plaintiff argues that the ice on the black steel piping in the #2 hold of the M/V Serafin Topic was a dangerous condition in the ship's work space, **of which the defendants should have known** and for which they may be held liable. (5a) (Emphasis in bold supplied)

Contrary to the impression created by the Brief in Opposition, the Stipulation which formed the basis for the District Court's decision in the instant case was not a limitation on what facts could be found nor was it a waiver of anything.[2] It was, as is clearly stated in its introductory paragraph, a stipulation that, "if the case were to be tried there would be evidence to support" the findings set forth in

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2. The assertion at page 11 of the Brief in Opposition that Petitioner "waived" what Respondents refer to as the "hidden danger" duty is simply not true. Petitioner did not "waive" any theory of recovery and there is no basis in the record for, nor is there any truth to, Respondents' assertion of a "waiver.".

the Stipulation (11a). The purpose of the Stipulation was to create a record for purposes of a Motion for Summary Judgment in lieu of using depositions and affidavits, but Petitioner, in entering into the Stipulation, did not waive the basic principle governing motions for summary judgment that the Court must view the factual record, and all the inferences reasonably to be drawn therefrom, in the light most favorable to the party, in this case the Petitioner, opposing the motion.[3]

The factual Stipulation in this case would support a jury finding (1) that the ice existed on the pipe *prior* to the start of cargo operations at Holt (15a), and (2) that it was condition that was capable of being discovered by a reasonable inspection (14a). While there was no evidence that Respondents had actual knowledge of the presence of the ice, the absence of actual knowledge would not preclude a jury finding of constructive knowledge if, under the law, a duty of inspection existed. This Court, in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 68 L.Ed.2d 1 (1981), specifically recognized that, as to conditions existing *prior* to the start of cargo operations, there was a duty of inspection which would support a finding of constructive knowledge. This principle is recognized in at least four places in the *Scindia* decision.[4]

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3. The attorney who represented Respondents in the District Court and who participated in the preparation of the Stipulation and signed it on behalf of Respondents retired prior to the taking of the appeal in this case. Counsel who prepared the Brief in Opposition filed in this Court did not handle the case at the District Court level and may not have been aware of the limited scope of the Stipulation as stated in the introductory paragraph of the Stipulation.

4. The following excerpts from the *Scindia* decision establish the principle that the vessel is charged with "constructive knowledge" of conditions existing at the commencement of cargo operations:

> ... This is true, *Scindia* argues, even though the hazard is an obviously defective ship's winch being used by the stevedore and his longshoremen

The single issue presented by this case is whether the vessel's duty of inspection *prior* to the start of cargo operations extends to the condition of the vessel's cargo stow. This is the issue on which there is a clear conflict in circuits and it is an issue which is clearly presented by the record in this case.

3. Contrary to Respondents' assertions at pages 9 through 13 of the Brief in Opposition, the instant case would have been decided differently under the law prevailing in both the Fifth and Ninth Circuits. In an effort to distinguish the instant case from the admittedly conflicting decisions of the Fifth and Ninth Circuits, Respondents argue that the Fifth and Ninth Circuit cases involved factual situa-

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...Continued...

> employees, and even if the winch was defective when the stevedore came aboard and *the vessel is charged with knowledge of the condition*. See 451 U.S. at 167-168, 68 L.Ed.2d at 13. (Emphasis supplied)
>
> . . . The malfunction being obvious and Seattle having continued to use it, Scindia submits that if it was aware of the condition *or was charged with knowledge of it*, it was nevertheless entitled to assume . . . . See 451 U.S. at 175, 68 L.Ed.2d at 17. (Emphasis supplied)
>
> Yet it is quite possible, it seems to us, that Seattle's judgment in this respect was so obviously improvident that Scindia, if it knew of the defect and that Seattle was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's winch. *The same would be true if the defect existed from the outset and Scindia must be deemed to have been aware of its condition*. See 451 U.S. at 176, 68 L.Ed.2d at 17-18. (Emphasis supplied)
>
> . . . But as we understand the opinion below, the Court of Appeals held that there was a triable issue as to whether the shipowner had actual knowledge of the failure of the winch's breaking mechanism *or was chargeable with knowledge because the winch was defective from the outset*. See 451 U.S. at 178, 68 L.Ed.2d at 19. (Emphasis supplied)

tions in which there was evidence that the vessel had actual knowledge of the unsafe condition of the cargo stow, *Woods v. Sammisa Co., Ltd., et al.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990), and *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), or the hazardous condition was created by the negligence of a foreign stevedore, *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982). However, in advancing these distinctions, Respondents simply have ignored the doctrine of constructive knowledge, a doctrine which has been applied by both the Fifth and Ninth Circuits in appropriate cases, see *Hernandez v. M/V Rajaan*, 841 F.2d 582, 586 (5th Cir. 1988), *Subingsubing v. Reardon Smith Line, Ltd.*, 682 F.2d 779, 781 (9th Cir. 1982). There is no reason to believe that these Circuits would not similarly apply the doctrine of constructive knowledge to a hazardous condition existing in a cargo stow in an appropriate case. The difference between the law in the Third Circuit, as set forth in *Derr*, and the law in the Fifth and Ninth Circuits, is that the Third Circuit has held that the vessel's duty of inspection (upon which constructive knowledge is predicated) does not extend to the condition of a cargo stow whereas the other Circuits have held that it does. In any Circuit in which the vessel's duty of inspection extends to the condition of a cargo stow the instant case, by definition, would be decided differently.

4. Respondents' argument that a Writ of Certiorari should be denied because a hazard created by the presence of ice in a cargo hold is unlikely to recur also is without merit. It is predicated on a far too narrow perception of the factual issue presented by the decision below. The factual issue presented by the instant case is the vessel's responsibility to inspect for an unsafe condition developing in a cargo stow during an ocean voyage *subsequent* to the cargo being loaded and *prior* to the start of discharging operations, in which the responsibility for creating the condition can not be attributed to any negligence on the part of the loading stevedore. Rather than being an unusual event, this is a factual picture which may frequently occur. Putting

aside the possible formation of ice, which is unusual, the possible shifting of cargo, even though properly stowed and secured, creating dangers for the discharging longshoremen is a factual situation which occurs all too frequently, as is the possibility of leakage of cargo from the containers in which they are packed and stored in the hold, creating slippery or other types of dangers for discharging longshoremen. That the instant case happened to involved a slipping on ice, rather than on grease or oil, or cashew nut oil, or cocoa butter, or some esoteric liquid chemical that a ship may be carrying, should not be allowed to obscure the true nature of the problem involved -- namely, does the vessel's duty of inspection extend to the condition of a cargo stow. That issue, on which there is an unquestioned conflict in circuits, is raised as clearly on the record in this case as it would be in any of the other multitude of situations in which it might arise.

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in the Petition, it is respectfully submitted that a Writ of Certiorari should issue to review the Opinion and Judgment of the court below.

Respectfully submitted,

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